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Public Bank Bhd v T Sivam a/l Tharamalingam (as the representative/executor for the estate of the late Nagamuthu a/l Periasamy)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
J-02(NCVC)(W)-1729-10 OF 2015
ALIZATUL KHAIR, NALLINI PATHMANATHAN AND ZABARIAH
C MOHD JJCA
1 JANUARY 2017

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Land Law — Charge — Indefeasibility of interest — Chargor's title obtained by way of fraud — Whether charge defeasible and may be set aside — Whether charge insufficient and void instrument — Whether earlier suit declaring chargor's title as invalid rendered charge invalid — Whether chargee's solicitor's knowledge of chargor's fraud imputable to chargee — Whether withdrawn caveat lodged relating to chargor's fraud should have put chargee on notice — Whether chargee entitled to rely on conclusiveness of records at land office showing charger as registered proprietor — Whether 'purchaser' in proviso to s 340(3) of the National Land Code includes chargees — Whether chargee a bona fide acquirer of interest for valuable consideration without notice of fraud — National Land Code ss 89, 340(2)(a), 340(2)(b) & 340(3)

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The respondent/plaintiff was the representative/executor of the estate of one Nagamuthu a/l Periasamy ('the deceased'). The deceased was the proprietor of a land in Johor ('the land'). On 16 May 2006, the deceased's son, Nagarajan, transferred the land to himself. Nagarajan subsequently charged the land to the appellant/defendant for a loan facility of RM100,000. A memorandum of charge was duly registered on 26 February 2007. The deceased instituted a Civil Suit No 22-77 of 2007 ('Suit 2007') against Nagarajan alleging that the transfer of the land was by fraudulent means. The High Court declared that the transfer of the land to Nagarajan was invalid as it was transferred by fraudulent means. The Court of Appeal dismissed Nagarajan's appeal and his application to the Federal Court for leave to appeal was also dismissed. Pursuant to that decision, the appellant was requested to discharge the charge and return the issue document of title of the land to the deceased's solicitors. However, the appellant refused to do so. Hence the respondent commenced the present action against the appellant seeking, inter alia, for a declaration that the charge in favour of the appellant was defeasible and liable to be set aside. The High Court allowed the reliefs prayed for and hence the present appeal by the appellant against that decision. Primarily the issue to be determined was whether the charge in favour of the appellant arose from a void instrument and

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was therefore liable to be set aside at the instance of the registered proprietor. The respondent alleged that the appellant had knowledge of the purported fraud because the security documentation solicitor of the appellant, DW2, had knowledge of the same through various correspondences and letters between Nagarajan's lawyer and the deceased's lawyer, where allegations of fraud were made. The other respondent further contended that a caveat had been lodged by one Tharamalingam ('brother of Nagarajan') on 14 July 2006 over the land before the facility agreement dated 22 February 2007 was entered into between the appellant and Nagarajan. This, the respondent claimed should have put the appellant on notice.

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Held, allowing the appeal with costs:

- (1) The judgment in Suit 2007 did not set aside the charge executed in favour of the appellant, as the charge was never an issue in Suit 2007. The issue before the court in Suit 2007 was, whether Nagarajan effected the transfer of the land by way of fraud (see paras 25–26).
- (2) It was the finding of the learned High Court judge that the deceased executed the transfer under the mistaken belief (as represented by Nagarajan to him) that the execution was to transfer the land to all his children, including Nagarajan. Little did he know that at that point in time, the transfer that he executed was to Nagarajan alone. Thus, the instrument of transfer from the deceased to Nagarajan was signed and validly executed by the deceased, except that it was by fraudulent means (see paras 27–28).
- (3) The land was already registered in Nagarajan's name at the point in time when the charge was registered on 26 February 2007. The appellant was entitled to rely on the conclusiveness of the records at the land office which showed that Nagarajan was the registered proprietor of the land pursuant to s 89 of the National Land Code ('the NLC') (see para 33).
- (4) A land search conducted by the appellant's solicitor on 26 February 2007, which was at the time of the drawdown of the loan, disclosed that Tharmalingam's caveat was already removed on 21 February 2007. This was before the facility agreement was entered into on 22 February 2007 and before the registration of the charge on 26 February 2007. Thus, when the loan was released and the charge registered on 26 February 2007, the caveat was no longer in existence as it had been removed. Further, mere knowledge of a caveat by itself cannot amount to notice of any fraud or intention of cheating the deceased (see paras 38 & 40–41).
- (5) The contention that DW2 had knowledge of the fraud was not pleaded. DW2 further testified that he did not at any point in time inform the defendant of the letters and correspondences. The defendant was not aware of any dispute between Nagamuthu/Nagarajan's family at that

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- A point in time. At this point in time, Suit 2007 was not filed yet. In addition, the judgment in Suit 2007 was only obtained in 2011 ie four years after the charge was registered and the loan disbursed (see paras 42, 44–45).
- B (6) One cannot impute knowledge of fraud of a solicitor as being knowledge of the client. Although the general rule is that the knowledge of a solicitor is that of the client, such that it is not open to the client to say that the solicitor did not disclose the true facts to him, an important exception to the general rule, is in cases of fraud. As such even if the DW2 could be
- C said to have had some knowledge of the allegations of fraud, such knowledge could not be imputed to the defendant (see para 46).
- D (7) The doctrine of constructive notice does not apply to the Torrens System, where registration is fundamental. Hence constructive notice of fraud, (as opposed to actual knowledge) was not acceptable in the instance case. There was no evidence of actual knowledge of fraud on the part of the defendant. The plaintiff also could not raise allegation of fraud or knowledge of the fraud on the part of the defendant as it was never pleaded (see paras 47–49).
- E (8) The learned trial judge had erred in concluding that the defendant's charge was defeasible. The findings in Suit 2007 were that, the instrument of transfer was signed and executed by the deceased to Nagarajan except that it was tainted with fraud as the transfer was executed under a mistaken belief that the transfer was to be made to
- F certain persons. Hence the situation fell under s 340(2)(a), not s 340(2)(b) of the NLC. The land was already transferred and registered in Nagarajan's name when the defendant granted the loan. Thus, the defendant was not the immediate acquirer of the interest in the land. The defendant, as holder of the charge, was the subsequent holder of interest in the land. Therefore, although the title to the land which was acquired
- G by Nagarajan was defeasible and liable to be set aside pursuant to s 340(2)(a) of the NLC, the defendant's registered charge remained valid and indefeasible pursuant to the proviso to s 340(3) of the NLC (see paras 53–56).
- H (9) Thus, the defendant, as the chargee, was a bona fide acquirer of a subsequent interest in the land for valuable consideration and who had no notice of the alleged fraudulent transfer of the land to Nagarajan. The charge was indefeasible and the defendant was entitled to the protection by virtue of the proviso to s 340(3) of the NLC (see para 67).
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[Bahasa Malaysia summary]

Responden/plaintif adalah wakil/wasi harta pesaka Nagamuthu a/l Periasamy ('si mati'). Si mati adalah pemilik tanah di Johor ('tanah tersebut'). Pada 16 Mei 2006, anak lelaki si mati, Nagarajan, telah memindah tanah itu di bawah

namanya. Nagarajan kemudian menggadaikan tanah tu kepada perayu/defendan untuk kemudahan pinjaman RM100,000. Memorandum gadaian telahpun didaftarkan pada 26 Februari 2007. Si mati telah memulakan Guaman Sivil No 22–77 tahun 2007 ('Guaman 2007') terhadap Nagarajan dengan medakwa bahawa pemindahan tanah itu adalah melalui cara penipuan. Mahkamah Tinggi mengisytiharkan bahawa pemindahan tanah kepada Nagarajan sebagai tidak sah kerana ia dipindahkan melalui cara penipuan. Mahkamah Rayuan telah menolak rayuan Nagarajan dan permohonannya kepada Mahkamah Persekutuan untuk kebenaran merayu juga ditolak. Berikutan keputusan itu, perayu memohon untuk melepaskan gadaian itu dan mengembalikan dokumen hak milik keluaran tanah itu kepada peguam cara si mati. Walau bagaimanapun, perayu enggan berbuat sedemikian. Justeru responden telah memulakan tindakan ini terhadap perayu memohon, antara lain, untuk deklarasi bahawa gadaian yang menyebelahi perayu boleh dibatalkan dan boleh diketepikan. Mahkamah Tinggi membenarkan relif-relif yang dipohon dan justeru rayuan ini oleh perayu terhadap keputusan tersebut. Terutamanya isu yang perlu ditentukan adalah sama ada gadaian yang menyebelahi perayu timbul daripada surat cara tidak sah dan dengan itu boleh diketepikan oleh pemilik berdaftar. Responden mendakwa bahawa perayu mempunyai pengetahuan tentang penipuan yang dimaksudkan itu kerana peguamcara yang menjamin keselamatan dokumentasi perayu, DW2, mempunyai pengetahuan sama melalui pelbagai hubungan dan surat antara peguam Nagarajan dan peguam si mati, yang mana dakwaan penipuan dibuat. Responden lain selanjutnya berhujah bahawa kaveat telah dimasukkan oleh Tharamalingam ('adik lelaki Nagarajan') pada 14 Julai 2006 ke atas tanah itu sebelum perjanjian kemudahan bertarikh 22 Februari 2007 dimasuki antara perayu dan Nagarajan. Ini dikatakan oleh responden sepatutnya sebagai notis kepada perayu.

Diputuskan, membenarkan rayuan dengan kos:

- (1) Penghakiman dalam Guaman 2007 tidak mengetepikan gadaian yang dimasukkan menyebelahi perayu, kerana gadaian itu bukan isu dalam Guaman 2007. Isu di hadapan mahkamah dalam Guaman 2007 adalah, sama ada Nagarajan membuat pemindahan tanah itu secara penipuan (lihat perenggan 25–26).
- (2) Ia adalah penemuan hakim Mahkamah Tinggi bahawa si mati telah melaksanakan pemindahan itu di bawah kepercayaan yang salah (seperti yang digambarkan oleh Nagarajan kepadanya) bahawa pelaksanaan itu adalah untuk memindah tanah itu kepada semua anak-anaknya, termasuk Nagarajan. Tanpa diketahui olehnya bahawa pada masa itu, pemindahan yang dilaksanakannya adalah kepada Nagarajan sahaja. Oleh itu, surat cara pemindahan daripada si mati kepada Nagarajan telah ditandatangani dan dilaksanakan secara sah oleh si mati, kecuali ianya adalah melalui penipuan (lihat perenggan 27–28).

- A (3) Tanah itu telahpun didaftarkan dalam nama Nagarajan pada masa bila gadaian itu didaftarkan pada 26 Februari 2007. Perayu berhak untuk bergantung kepada kemuktamadan rekod di pejabat tanah yang menunjukkan bahawa Nagarajan adalah pemilik berdaftar tanah itu menurut s 89 Kanun Tanah Negara ('KTN') (lihat perenggan 33).
- B (4) Carian tanah yang dijalankan oleh peguamcara perayu pada 26 Februari 2007, yang mana adalah pada masa pengeluaran pinjaman itu, menunjukkan bahawa kaveat Tharmalingam telahpun dibatalkan pada 21 Februari 2007. Ini adalah sebelum perjanjian kemudahan itu dimasuki pada 22 Februari 2007 dan sebelum pendaftaran gadaian pada 26 Februari 2007. Oleh itu, apabila pinjaman dilepaskan dan gadaian didaftarkan pada 26 Februari 2007, kaveat itu tidak lagi wujud kerana telah dibatalkan. Selanjutnya, pengetahuan semata-mata tentang kaveat itu dengan sendiri tidak merupakan notis tentang apa-apa penipuan atau niat penipu di mati (lihat perenggan 38, 40–41).
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- D (5) Hujah bahawa DW2 mempunyai pengetahuan tentang penipuan itu tidak dipli. DW2 selanjutnya memberi keterangan bahawa dia tidak pada bila-bila masa memberitahu defendan tentang surat-surat dan hubungan tersebut. Defendan tidak menyedari tentang apa-apa pertikaian antara keluarga Nagamuthu/Nagarajan pada masa tersebut. Pada masa ini, Guaman 2007 masih belum difailkan. Tambahan, penghakiman dalam Guaman 2007 hanya diperoleh pada 2011; iaitu empat tahun selepas gadaian didaftarkan dan pinjaman dikeluarkan (lihat perenggan 42, 44–45).
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- F (6) Seseorang itu tidak boleh mengkaitkan pengetahuan tentang penipuan peguamcara sebagai pengetahuan anak guam. Walaupun rukun am adalah pengetahuan peguamcara adalah seperti anak guam, yang mana ia tidak terbuka kepada anak guam untuk mengatakan bahawa peguamcara tidak mendedahkan fakta sebenar kepadanya, pengecualian penting kepada rukun am, adalah dalam kes penipuan. Oleh itu meskipun DW2 boleh dikatakan mempunyai pengetahuan tentang dakwaan penipuan itu, pengetahuan sedemikian tidak boleh dikaitkan dengan defendan (lihat perenggan 46).
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- H (7) Doktrin notis konstruktif tidak terpakai kepada Sistem Torrens, di mana pendaftaran adalah penting. Justeru notis konstruktif penipuan, (berbanding dengan pengetahuan sebenar) tidak boleh diterima dalam kes ini. Tiada keterangan pengetahuan sebenar di pihak defendan. Plaintif juga tidak boleh menimbulkan dakwaan penipuan atau pengetahuan tentang penipuan di pihak defendan kerana ia tidak diplikasi (lihat perenggan 47–49).
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- (8) Hakim perbicaraan yang bijaksana terkhilaf dalam membuat kesimpulan bahawa gadaian defendan dapat dibatalkan. Penemuan dalam Guaman 2007 adalah bahawa, surat cara pemindahan telah ditandatangani dan dilaksanakan oleh si mati kepada Nagarajan kecuali bahawa ia dicemari dengan penipuan kerana pemindahan itu telah dilaksanakan di bawah kepercayaan salah bahawa pemindahan itu telah dibuat oleh orang tertentu. Justeru keadaan ni terjatuh di bawah s 340(2)(a), bukan s 340(2)(b) KTN. Tanah itu telahpun dipindahkan dan didaftarkan dalam nama Nagarajan apabila defendan memberikan pinjaman. Oleh itu, defendan bukan pemeroleh serta-merta kepentingan dalam tanah itu. Defendan, sebagai pemegang gadaian tu, adalah pemegang berikutnya kepentingan dalam tanah itu. Oleh demikian, meskipun hak milik tanah itu yang telah diperoleh oleh Nagarajan adalah boleh dibatalkan dan boleh diketepikan menurut s 340(2)(a) KTN, gadaian berdaftar defendan masih kekal sah dan tidak boleh disangkal menurut peruntukan s 340(3) KTN (lihat perenggan 53–56). A
- (9) Oleh itu, defendan, sebagai pemegang gadaian, adalah pemeroleh berniat baik untuk kepentingan berikutnya dalam tanah itu untuk balasan bernilai dan yang tidak mempunyai notis tentang pemindahan tanah yang dikatakan secara penipuan kepada Nagarajan. Gadaian itu tidak boleh disangkal dan defendan berhak mendapat perlindungan menurut peruntukan s 340(3) KTN (lihat perenggan 67).] B
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Notes

For cases on indefeasibility of interest, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2871–2875. F

Cases referred to

- Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, FC (refd) G
- Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987, FC (distd)
- Kasai Reiko v Annie Lor Lee Fong & Ors (Public Bank Bhd, intervener)* [2014] 7 MLJ 652, HC (refd)
- Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2008] 5 MLJ 128, CA (refd) H
- State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589, CA (refd)
- Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120; [2005] 3 CLJ 539, CA (refd)
- Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd) I

A Legislation referred to

National Land Code ss 5, 89, 340(2)(a), (2)(b), (3), Form 14A

Appeal from: Civil Suit No 22NCVC-78 of 2013 (High Court, Muar)

B *Chan Kok Keong (Samuel Tan with him) (Shook Lin & Bok) for the appellant. S Prakash (K Navinderan and Satchitanandan with him) (Kamil Hashim Raj & Lim) for the respondent.*

Zabariah Mohd JCA:**C**

[1] This judgment is in respect of an appeal by the appellant (the defendant in the court below) against the decision of the High Court judge of Muar dated 9 September 2015, in allowing the respondent's (the plaintiff's in the court below) claim, after a full trial.

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[2] Parties will be referred to as they were in the court below.

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[3] The defendant is Public Bank Bhd whilst the plaintiff is the representative/executor of the estate of one Nagamuthu a/l Periasamy ('the deceased').

BACKGROUND**F**

[4] At all material times, the deceased was the proprietor/owner of the land held under HM No HS (M) 3612 Lot No 913, Mukim of Renggam, District of Kluang, Johor ('the land').

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[5] On or about 16 May 2006, the deceased's son, Nagarajan a/l Nagamuthu ('Nagarajan') transferred the land to himself under Perserahan No 1639/2006.

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[6] Nagarajan subsequently charged the land to the defendant, pursuant to a letter of offer dated 18 October 2006 and facilities agreement dated 22 February 2007, whereby the defendant granted a fixed loan of RM100,000 to Nagarajan and one Sithra Velusamy.

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[7] A memorandum of charge was duly registered on 26 February 2007 under charge presentation No 520/2007.

[8] The deceased instituted a Civil Suit No 22-77 of 2007 ('Suit 2007') against Nagarajan at the Muar High Court alleging that the transfer of the land

was by fraudulent means. After a full trial, the Muar High Court on 18 October 2011 declared that the transfer of the land to Nagarajan under Perserahan No 1639/2006 was invalid as it was transferred by fraudulent means.

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[9] Nagarajan appealed to the Court of Appeal on the Muar High Court decision dated 18 October 2011. The Court of Appeal dismissed his appeal and affirmed the Muar High Court's decision on 20 September 2012. He filed a notice of motion to the Federal Court for leave to appeal which was dismissed on 9 July 2013.

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[10] Before the death of the deceased on 14 February 2014, the solicitors of the deceased notified the defendant by a letter dated 17 August 2013 of the orders of the Muar High Court dated 18 October 2011, Court of Appeal dated 20 September 2012 and the Federal Court dated 9 July 2013, regarding the invalidity of the transfer of the land to Nagarajan. At the same time the defendant was requested to discharge the charge and return the issue document of title of the land to the deceased's solicitors, Messrs Kamil Hashim Raj & Lim forthwith.

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[11] However, the defendant failed, refused to comply with the request of the solicitors of the deceased.

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[12] In October 2013, the administrator of the estate of the deceased, filed a writ, Suit No 22NCVC-78 of 2013 and a statement of claim in the Muar High Court against the defendant seeking, inter alia, for a declaration that the charge in favour of the defendant is defeasible and liable to be set aside ('Suit 78'). On 9 September 2015, the Muar High Court allowed the reliefs prayed for, by the respondent.

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[13] Dissatisfied with the decision of the Muar High Court dated 9 September 2015, the defendant appealed to the Court of Appeal, which is the present appeal before us.

THE ISSUE

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[14] Primarily the issue to be determined, is whether the charge executed by Nagarajan, which was registered in favour of the defendant arose from a void instrument and is therefore liable to be set aside at the instance of the registered proprietor.

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A THE PLAINTIFF'S CASE

[15] The deceased had obtained a declaratory order dated 18 October 2011 vide Suit 2007, that the transfer of the land to Nagarajan from deceased was invalid as it was found that the acquisition of the land by Nagarajan was by fraudulent means.

[16] Therefore, it was submitted by the plaintiff that Nagarajan's purported title to the land was defeated pursuant to s 340(2)(a) of the National Land Code as a result of the fraud committed by him.

[17] The plaintiff relied on the case of *Subramaniam all NS Dhurai v Sandrakasan all Retnasamy & Ors* [2005] 6 MLJ 120; [2005] 3 CLJ 539 where the Court of Appeal adopted the *nemo dat* rule that a person who has no good title in the land is incapable of passing any title to others. Hence, it was submitted by the plaintiff that the registration of the charge in favour of the defendant by Nagarajan was executed from a void instrument and thus, ought to be set aside.

[18] The plaintiff further referred to the ratio of the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 which was followed in the Federal Court case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987 wherein it ruled that the shield under s 340(3) of the National Land Code, does not apply to the immediate holder of interest of the land. It was submitted on behalf of the plaintiff that, the defendant, after having acquired an interest directly from Nagarajan, who was the fraudster, falls within the definition of an immediate holder of interest on the land. As such, applying the cases of *Tan Ying Hong v Tan Sian San & Ors* and *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors*, the plaintiff submitted that any form of reliance by the defendant on the bona fide provision laid down in the sub proviso to s 340(3) of the National Land Code would be erroneous and liable to be set aside.

[19] The plaintiff was of the view that the facts in *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors*'s case fall squarely with the facts before us ie that the defendant falls within the definition of an immediate holder of interest on the land. Thus, it was submitted that, consequently, the defendant's interest in the land by virtue of the charge, is defeasible and liable to be set aside in the hands of the defendant.

[20] The plaintiff stated that the judgment of the learned High Court judge in the present suit was correct when she arrived at a finding that the defendant

is an immediate holder of interest in the land. Therefore, it was submitted that, the learned judge's findings that the defendant could not seek protection under s 340(3) of the National Land Code, was correct and ought not to be disturbed by this court.

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THE DEFENDANT'S CASE

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[21] The defendant maintained that it had no knowledge of the purported fraudulent or improper acquisition of the land by Nagarajan from the deceased.

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[22] The defendant contended that the charge which was executed in its favour is indefeasible as the defendant had acquired a subsequent interest in the land as a registered chargee in good faith and for valuable consideration. Hence, the proviso to s 340(3) of the National Land Code is applicable to the defendant despite the transfer to Nagarajan having been allegedly obtained by fraudulent means.

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FINDINGS

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[23] From the chronology of events in the case before us, we take note of the following facts:

- (a) Suit 2007 was filed after the charge in favour of the appellant was registered;
- (b) the writ and statement of claim of Suit 2007 was dated 20 June 2007;
- (c) the charge in favour of the defendant was executed on 22 February 2007 and was registered at the Kluang Land Office on 26 February 2007;
- (d) the writ and statement of claim of Suit 2007 was never served on the defendant and neither was the defendant made a party to the same; and
- (e) the defendant was also never served with the judgment of Suit 2007 before 2013. The judgment was only served on the defendant in 2013 vide a letter from Messrs Hashim Pury & Lim which was addressed to the defendant.

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[24] The abovesaid facts were never disputed by the plaintiff during the trial.

[25] It is pertinent to note that the judgment in Suit 2007 did not set aside the charge which was executed in favour of the appellant, as the charge was never an issue in Suit 2007 at the Muar High Court.

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- A The issue before the Muar High Court as can be gleaned from para 7 of the grounds of the learned High Court judge in Suit 2007 was, whether Nagarajan effected the transfer of the land by way of fraud.
- B [26] As for the case before us, the central issue is the charge, and the plaintiff pleaded that the charge is not valid because the transfer from the deceased to Nagarajan was premised on an invalid instrument (refer to para 11 of the amended reply to the statement of claim).
- C [27] From the judgment of the learned High Court judge in Suit 2007 (Tab 18 common core bundle Vol 1), it was the finding of the learned High Court judge that the deceased executed the transfer under the mistaken belief (as represented by Nagarajan to him) that the execution was to transfer the land to all his children, including Nagarajan. Little did he know that at that point in
- D time, the transfer that he executed was to Nagarajan alone. The relevant part of the judgment reads:
- 12.1. saya dapati ... Plaintiff telah menandatangani dokumen-dokumen tersebut *atas tanggapan yang diberi oleh Defendan* kepadanya bahawa dokumen-dokumen ini adalah bagi maksud membolehkan pindahmilk hartanah tersebut kepada semua anak-anak Plaintiff, termasuk Defendan;
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- 12.2 jika tidak oleh kerana tanggapan yang salah yang diberi oleh Defendan kepada Plaintiff itu, Plaintiff tidak mungkin menandatangani dokumen-dokumen tersebut ...
- F [28] Thus, the instrument of transfer from the deceased to Nagarajan was signed and validly executed by the deceased, except that it was by fraudulent means.
- G [29] The plaintiff further alleged that the defendant is not a bona fide purchaser and therefore the proviso to s 340(3) of the National Land Code does not provide protection to the defendant. The plaintiff alleged that the defendant was negligent in not carrying out a proper search on the land with the Kluang Land Office because if such was done, the defendant would have discovered that:
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- (a) the transfer of the land to Nagarajan was being objected to, by the deceased's children pursuant to a letter dated 29 July 1999;
- (b) there were two issue documents of title for the land issued by the Kluang Land Office which contain the same registration date; and
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- (c) a caveat had been lodged by Tharamalingam a/l Nagamuthu (brother to Nagarajan) on 14 July 2006 over the land before the facility agreement dated 22 February 2007 had been entered between the defendant, Nagarajan and Sithra.

[30] The above allegations by the plaintiff, however, were never pleaded by the plaintiff in his pleadings and hence it is outside the purview of our consideration. A

[31] In any event, the allegation by the plaintiff that a search in the Kluang Land Office would have revealed a letter dated 29 July 1999 allegedly informing that there were objections from the deceased's children with regards to the transfer of the land to Nagarajan, has no merits. B

[32] A perusal of the letter dated 29 July 1999 showed that it was not addressed to the defendant. Neither was there evidence at trial to prove that the letter was ever received by the defendant. Hence how could the defendant have had knowledge of the letter. In addition, it is not for the defendant to peruse through all the correspondences in the land office files before proceeding to register the charge. That would be an onerous task to impose on the defendant. C D

[33] From the undisputed facts, the land was already registered in Nagarajan's name at the point in time when the charge was registered on 26 February 2007. The defendant was entitled to rely on the conclusiveness of the records at the land office which showed that Nagarajan is the registered proprietor of the land pursuant to s 89 of the National Land Code. E

[34] On the allegation that there were two issue documents of title for the land issued by the Kluang Land Office which contains the same registration date — we are of the view that these arguments also bear no merit. A perusal of the two titles, discloses one of the titles was dated 22 June 2007 (pp 40–41 common core bundle Vol 1) which showed the deceased as the registered proprietor whilst the other title dated 29 June 2006 (pp 42–43, common core bundle Vol 1) shows that Nagarajan as the registered proprietor. F

[35] The land was transferred to Nagarajan on 16 May 2006. Hence, logically and correctly, the title dated 29 June 2009 is the updated version of the title pertaining to the land. There is nothing suspicious or irregular about the two titles as alleged. G

[36] The other allegation by the plaintiff to defeat the defendant's claim that it was acting bona fide without knowledge of the fraud, is that a caveat had been lodged by Tharamalingam a/l Nagamuthu (brother to Nagarajan a/l Nagamuthu) on 14 July 2006 over the land before the facility agreement dated 22 February 2007 had been entered into between the defendant, Nagarajan and Sithra. This, according to the plaintiff, should have put the defendant on notice before registering the caveat. H I

[37] It was pleaded by the plaintiff that the caveat was entered on 13 July

A 2006 ie before the facility agreement dated 22 February 2007 was entered into between the defendant and Nagarajan and Sithra.

B [38] However, at the time when the defendant's solicitor conducted a land search on 26 February 2007, which was at the time of the drawdown of the loan, the search disclosed that Tharmalingam's caveat was already removed on 21 February 2007. This was before the facility agreement was entered into on 22 February 2007 and before the registration of the charge on 26 February 2007.

C [39] It was also alleged by the plaintiff that the defendant knew of the existence of the caveat when the defendant issued the letter of offer of the loan on 18 October 2006. Again, this was not pleaded by the plaintiff and neither was it proven at trial.

D [40] Essentially, from the facts, at the point in time when the loan was released and the charge registered on 26 February 2007, the caveat was no longer in existence as it had been removed. In any event, there was no finding by the trial judge that the defendant had knowledge of the caveat at the material time.

E [41] Further, cases have shown that mere knowledge of a caveat by itself cannot amount to notice of any fraud or intention of cheating the deceased Nagamuthu (see *Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2008] 5 MLJ 128 at pp 153 and 155).

F [42] In the course of the trial, the plaintiff alleged that the defendant had knowledge of the purported fraud because the security documentation solicitor of the defendant, P Thirumalai had knowledge of the same through various correspondences and letters between Nagarajan's lawyer and the deceased Nagamuthu's lawyer, where allegations of fraud were made. We note that these facts, correspondences and allegations were never pleaded nor particularised in the pleadings.

G [43] In any event, there was no evidence to show that the defendant had knowledge of the dispute between Nagarajan and the deceased at the time, or the exchanges between the lawyers when the charge was executed.

H [44] It was in evidence in the examination in chief of Mr P Thirumalai ('DW2') that, he did not, at any point in time inform the defendant of these letters and correspondences and none were ever forwarded to the defendant. This evidence was not challenged.

[45] In addition, the defendant's branch manager, DW1 confirmed in evidence that the defendant was not aware of any dispute between Nagamuthu/Nagarajan's family at that point in time. It is pertinent to note that, at this point in time, Suit 2007 was not filed yet. In addition, the judgment in Suit 2007 was only obtained in 2011 ie four years after the charge was registered and the loan disbursed.

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[46] Further, case law has established that one cannot impute knowledge of fraud of a solicitor as being knowledge of the client. Although the general rule is that the knowledge of a solicitor is that of the client, such that it is not open to the client to say that the solicitor did not disclose the true facts to him, an important exception to the general rule, is in cases of fraud. As such even if the defendant's security documentation lawyer can be said to have had some knowledge of the allegations of fraud, such knowledge cannot be imputed to the defendant.

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[47] As for the doctrine of constructive notice, it is settled law as specified in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 at p 88 that such a doctrine does not apply to the Torrens System, as that would be accepting the concept of constructive notice of allegations of fraud or lack of good faith which is inapplicable under the Torrens System, where registration is fundamental. The court in *Doshi v Yeoh Tiong Lay* held that:

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It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent ...

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But the doctrine of constructive notice, which is all the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the facts of registration.

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[48] Hence constructive notice of fraud, (as opposed to actual knowledge) is not acceptable in the instance case. As it stands, there is no evidence of actual knowledge of fraud on the part of the defendant.

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[49] Be that as it may, the plaintiff cannot raise such an allegation of fraud or knowledge of the fraud on the part of the defendant, as the same was never pleaded.

I

[50] The High Court in the present suit, made findings of fact that the appellant had proven that it had no notice of the fraudulent transfer of the land to Nagarajan. The relevant part of the judge's judgment reads:

(e) *Walaupun defendan telah membuktikan bahawa carian telah dibuat terhadap hakmilik hartanah bagi membuktikan tidak ada notis diserahkan mengenai kewujudan frod dalam pemilikan hartanah oleh Nagarajan a/l Nagamuthu, defendan*

- A masih tidak boleh mengguna pakai proviso di bawah s 340 Kanun Tanah Negara memandangkan gadaian tersebut berdasarkan instrument yang tidak sah dan dengan itu perlu diketepikan ...
- B [51] Despite making such findings of facts, nevertheless, the trial judge went on to make a finding that the defendant could not seek the protection of the proviso of s 340(3) of the National Land Code, as the defendant was an immediate acquirer of an interest in the land. Consequently, the learned trial judge held that the charge must be set aside as it was premised on a void instrument of transfer as the transfer from the deceased to Nagarajan was by fraudulent means.
- C
- D [52] The learned judge premised her decision on *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120; [2005] 3 CLJ 539, *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 where she was of the view that based on the aforesaid cases, regardless if the acquisition of the land was bona fide and for valuable consideration, so long as the transfer was based on a void instrument, then the transfer ought to be set aside. Hence she concluded by saying that:
- E Oleh itu, memandangkan instrument yang digunakan oleh Nagarajan a/l Nagamuthu adalah instrument yang tidak sah, maka pinjaman yang dipohon dengan menggadaikan hartanah dengan menggunakan instrument yang tidak sah telah menjadikan gadaian tersebut juga tidak sah.
- F [53] By this, the learned trial judge had run into error in her findings, when she concluded that the defendant's charge was defeasible as the defendant was an immediate acquirer of an interest in the land and the charge was based on a void instrument of transfer.
- G [54] The learned trial judge also relied on the judgment in Suit 2007 of the Muar High Court. However the findings of the Muar High Court in Suit 22-77 of 2007 were that, the instrument of transfer was signed and executed by the deceased to Nagarajan except that it was tainted with fraud as the transfer was executed under a mistaken belief that the transfer was to be made to certain persons. Hence the situation falls under s 340(2)(a), not s 340(2)(b) of the National Land Code.
- H
- I [55] It is undisputed that the land was already transferred and registered in Nagarajan's name when the defendant granted the loan to the borrowers (Nagarajan and Sithra). Thus, from the facts, the defendant is not the immediate acquirer of the interest in the land. The defendant, as holder of the charge, was the subsequent holder of interest in the land.

[56] Therefore, although the title to the land which was acquired by Nagarajan under presentation No 1639/2006 dated 16 May 2006 was defeasible and liable to be set aside pursuant to s 340(2)(a) of the National Land Code, the defendant's registered charge remains valid and indefeasible pursuant to the proviso to s 340(3) of the same.

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Section 340(3) provides that:

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub section (2) —

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- (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
- (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub section shall affect *any title or interest acquired by any purchaser in good faith* and for valuable consideration, or by any person or body claiming through or under such a purchaser.

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[57] The term 'purchaser' in the proviso to s 340(3) of the National Land Code is not limited to persons who acquired the land but would also include, inter alia, lessees and chargees.

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[58] Section 5 of the National Land Code defines 'purchaser' as 'a person or body who in good faith and for valuable consideration acquired title to, or any interest in the land' (refer to the case of *Kasai Reiko v Annie Lor Lee Fong & Ors (Public Bank Bhd, intervener)* [2014] 7 MLJ 652 at p 673).

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[59] The proviso to s 340(3) of the National Land Code provides protection to subsequent holders of title or interest who had acquired such title or interest in good faith and for valuable consideration.

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[60] The term 'good faith' and 'bona fide' has been used interchangeably. The term 'bona fide purchaser' was defined in the case of *State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589 at p 603 which means:

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The term 'bona fide purchaser' has been used in a host of cases. Simply put it means a buyer in good faith. And the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction. But the overwhelming consideration is 'the particular circumstances of each case'.

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[61] The Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 at p 7, affirmed the position of law that chargee banks that are subsequent holders of interest can avail themselves of the protection under the

A proviso of s 340(3) of the National Land Code.

B [62] Despite the finding of fact by the learned trial judge in the present suit that the defendant in this case had no notice of any fraud whatsoever and that the defendant was a bona fide purchaser for valuable consideration, nonetheless the learned trial judge fell into error when she failed to appreciate the legal principle that was enunciated in the case of *Tan Ying Hong v Tan Sian San & Ors* with regards to deferred indefeasibility.

C [63] In *Tan Ying Hong v Tan Sian San & Ors*, the transfer Form 14A was executed pursuant to a forged power of attorney. In like manner, our case herein is premised upon an invalid memorandum of transfer, whereby Nagarajan acquired title to the land fraudulently through an instrument of transfer and subsequently granted a charge over the land to the defendant.

D [64] Further, the learned trial judge relied on *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768. The facts in that case can be distinguished with our present case. In *Kamarulzaman*, the first to the fourth respondents therein, from whom the fifth and sixth respondents obtained the title, were not immediate purchasers but were imposters who obtained a distribution order of the deceased's estate. Hence, the first to the fourth respondents never acquired any title to the land. There was no dealing, acquisition, transfer, purchase of any sort over the land as far as the first to the fourth respondents were concerned. Hence the *nemo dat* rule applies.

F [65] Unlike our case there was a transfer of the land to Nagarajan whereby he acquired a legal title (albeit fraudulently) through an instrument of transfer, before the execution of the legal charge.

G [66] The plaintiff also raised the issue of the absence of consent by the state authority in respect of the creation of the charge and hence submitted that the charge is invalid. It was in evidence at trial (and not disputed) that on 30 August 1986, the Director of Land and Mines Johor had provided a blanket consent which allowed registered proprietors of land (in this case Nagarajan) to provide or grant charges over the land to finance companies ('the appellant')

H pursuant to Circular PTG Johor Bil 10/1986.

I [67] Thus, the defendant, as the chargee, is a bona fide acquirer of a subsequent interest in the land for valuable consideration and who had no notice of the alleged fraudulent transfer of the land to Nagarajan. The charge is indefeasible and the defendant is entitled to the protection by virtue of the proviso to s 340(3) of the National Land Code.

[68] Based on the foregoing, we allowed the appeal. The order of the High

Court was set aside with costs of RM10,000 subject to the payment of allocator upon extraction of the order. Deposit was to be refunded. **A**

Appeal allowed with costs.

Reported by Kanesh Sundrum **B**

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